

UNITED STATES
v.
DON LEE SETO AND PAULINE SETO

IBLA 78-171

Decided May 3, 1978

Appeal from decision of Administrative Law Judge E. Kendall Clarke, declaring lode mining claim null and void in contest No. OR-14765.

Affirmed.

1. Mining Claims: Discovery: Generally

A discovery of a valuable mineral deposit has been made where minerals have been found and the evidence is of such a character that a person of ordinary prudence would be justified in the further expenditure of his labor and means with a reasonable prospect of success in developing a valuable mine.

2. Administrative Procedure: Burden of Proof -- Mining Claims:
Contests -- Mining Claims: Discovery: Generally

When the Government contests a mining claim on a charge of no discovery, it assumes the burden of going forward with sufficient evidence to establish a prima facie case; the burden then shifts to the claimant to show by a preponderance of the evidence that a discovery has been made and still exists within the limits of the claim.

3. Administrative Procedure: Hearings -- Mining Claims: Hearings

The Government has established a prima facie case when a mineral examiner testifies that

he has examined a mining claim and has found the mineral values insufficient to support a finding of discovery.

APPEARANCES: Don Lee Seto, pro se; Joseph B. Brooks, Esq., Office of the Solicitor, Department of the Interior, Portland, Oregon.

OPINION BY ADMINISTRATIVE JUDGE FISHMAN

This is an appeal from a decision dated December 15, 1977, by Administrative Law Judge E. Kendall Clarke, declaring the KeKaWaKa Lode Mining Claim, situated in Douglas County, Oregon, null and void for lack of discovery of a valuable mineral deposit.

The contest was initiated by the Bureau of Land Management (BLM), which filed a complaint on January 7, 1976, alleging that the land embraced within the claim was nonmineral in character and that minerals had not been found within the limits of the claim in sufficient quantities to constitute a valid discovery.

An evidentiary hearing was conducted on June 25, 1976, in Portland, Oregon.

[1, 2, 3] The Judge found from the evidence that the contestant established a prima facie case of no discovery, and that contestee failed to show by a preponderance that a discovery existed at the time of the hearing. The Judge's decision sets out the pertinent evidence and the applicable law. We agree with the decision and therefore adopt it as the decision of this Board.

Appellants submit essentially the following statements in support of the appeal:

- (a) The Government mining engineer who examined the claim on several occasions should have been satisfied with the claim;
- (b) The Government mining engineer failed to properly examine the claim, specifically a large tunnel behind the cabin over the hill;
- (c) The Government mining engineer's understanding of the claim's boundaries was in error; and
- (d) The geology and history of the area support mineralization.

The appellants' assertions are unsupported by the record. The Judge's decision, on page 2, explains the mining engineer's examination of the claim and his conclusions as developed in the testimony,

There is no evidence which would cast doubt upon the engineer's qualifications or on the conclusions he reached with respect to the claim. Appellants have demonstrated no error which would require disturbing the decision reached by the Judge.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

Frederick Fishman
Administrative Judge

We concur:

Joan B. Thompson
Administrative Judge

Douglas E. Henriques
Administrative Judge

December 15, 1977

United States of America,	:	<u>Contest No. OR-14765</u>
	:	
Contestant	:	Involving the KeKaWaKa Lode
	:	Mining Claim, situated in
v.	:	the SW-1/4 SW-1/4 of Sec.
	:	11, T. 31 S., R. 5 W., W.M.,
Don Lee Seto and	:	Douglas County, Oregon
Pauline Bell Seto	:	
	:	
Contestees	:	

DECISION

Appearances: Joseph B. Brooks, Attorney, Office of
the Solicitor, U. S. Department of the
Interior, Portland, Oregon, for the Contestant;

William B. Murray, Attorney and Counselor at Law, Portland,
Oregon, for the Contestees.

Before: Administrative Law Judge Clarke.

This proceeding was initiated by the Bureau of Land Management through the filing of a Complaint on January 7, 1976. The Complaint in paragraph 5 alleges:

- "a. The land embraced within the claim is nonmineral in character.
- b. Minerals have not been found within the limits of the claim in sufficient quantities to constitute a valid discovery."

By Notice of Hearing of April 16, 1976, the case was set for hearing on June 25, 1976 in Portland, Oregon and held as scheduled.

The claim here in question, the KeKaWaKa lode claim, is located in Douglas County, Oregon where it was filed as a lode claim on July 2, 1945 and subsequently quitclaimed to the Contestees May 7, 1946. The Contestees appear to regard the claim basically as a placer claim.

Mr. Joseph Rudys, a fully-qualified, experienced mining engineer employed by the Bureau of Land Management, testified concerning his examination of this claim. He stated that the Bureau of Land Management had not become aware of the existence of the mining claim until three or four years ago when it was discovered that green timber had been cut on the claim. (Tr. 9). Mr. Rudys examined the claim on several occasions beginning August 8 and August 22, 1974, May 14, 1975, May 25, 1976, and June 14, 1976. On these occasions he took no hard rock samples for he didn't see anything worth sampling. (Tr. 12 and 42). He did, however, take some placer samples. (Tr. 12). He discussed the mineralization with Ted Seto, the son of the mining claimant, and attempted to make an arrangement to meet the claimant although he was never able to do so.

Ted Seto indicated that he thought that the mineral present was gold and felt the place to look would be in a tunnel on the claim. (Tr. 11). The tunnel is about seven feet deep and has caved in. Mr. Rudys estimated the tunnel and dump was in the neighborhood of 20 to 25 years old and was moss covered. He did not see any rock that had any indications of mineral and therefore took no samples. (Tr. 12). Ted Seto apparently had dug two small pits, but these were shallow and sloughed in so that Mr. Rudys took no samples there. (Tr. 12, 34, 35). He did sample some of the gravel in the creek bed and got black sands, but no visible gold.

Mr. Rudys described the general geology of the area (Tr. 14) and based upon his examination of the claim and the study of the geology of the area he concluded that there was no evidence on the claim or in the records or in the history that he knew which would indicate that the land embraced within the mining claim was mineral in character. (Tr. 15). Further based on his examination he concluded that an ordinary prudent person would not be justified in spending his labor and means with the expectation of developing a paying mine. (Tr. 16, 17).

Don Seto, the claimant herein, testified that he had removed six ounces of gold from the claim. (Tr. 50). He also mentioned finding copper, nickel, silver and platinum on the claim, but offered no proof in the form of assay certificates. Mr. Seto also discussed lode values in a tunnel which he described as being over the hill to the south of the creek and buildings. (Tr. 61).

Mr. Rudys on rebuttal, however, introduced a claim map sketched by Ted Seto which indicates that the adit or tunnel which Mr. Don Seto described was not on the claim here in question, but probably on the Marie which was not involved in the captioned contest. (Tr. 72).

SUMMARY OF APPLICABLE LAW

In this proceeding, the Contestant is required to produce sufficient evidence to establish a prima facie case in support of its contention that a discovery does not exist on the contested claim. Thereafter, the Claimant must show by a preponderance of the evidence that the claim is valid. Foster v. Seaton, 271 F. 2d 836 (D.C., C.A., 1959); United States v. Springer, 491 F. 2d 239, 242, (9th Cir. 1974), cert. denied, 95 S.Ct. 60 (1974).

The Act under which these mining claims were located (30 U.S.C., 22 et seq., May 10, 1872) requires for a valid claim the discovery of a valuable mineral deposit.

It has been held in a long list of cases beginning in 1894 that a discovery of a valuable mineral exists where:

"* * * minerals have been found and the evidence is of such a character that a person of ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success, in developing a profitable mine" Castle v. Womble, 19 L. D. 455, 457 (1894).

In the United States Supreme Court case of Chrisman v. Miller, 197 U. S. 313 (1905), the Court approved the earlier definition by the Department, Castle v. Womble, supra, that a mineral found on a claim such as gold or silver must exist in quantities sufficient to justify the expenditure of money for the development of the claim and extraction of the mineral. (See also Best v. Humboldt Placer Mining Co., 371 U.S. 334 (1963)).

The Supreme Court has further held that it is the intent of the mining laws to reward the discovery of minerals which are valuable in an economic sense and that the minerals which would not be extracted by a prudent man because there is no demand for them for a price higher than the extraction and transportation costs are not economically valuable. United States v. Coleman, 390 U.S. 599 (1968).

A prima facie case has been made when a Government mineral examiner testifies that he has examined the claim and found the evidence of mineralization insufficient to support a finding of a discovery. United States v. Shield, 17 IBLA 91 (1974); United States v. Ramsher Mining and Engineering Co., Inc., 13 IBLA 268 (1973); United States v. Woolsey, 13 IBLA 120 (1973); United States v. Gould, A-30990 (May 7, 1969).

DISCUSSION AND CONCLUSION

Although the Contestees herein assert that the Government failed to make a prima facie case insofar as Mr. Rudys' failure to take samples of a hard rock or lode aspects of this claim, I nonetheless have determined that the Government in fact did establish a prima facie case of failure to make a discovery. It is not necessary for a trained mining engineer to take samples from places where his experience dictate to him that taking samples would be a futile effort. Mr. Rudys testified that he saw no mineralization warranting the taking of samples. Under these circumstances an adequate examination has been made sufficient to establish a prima facie case. It is not the duty of the Government mining engineer to provide the discovery work for the mining claimant. His duty is merely to confirm the existence of a discovery which is asserted by the mining claimant. (United States v. Bechthold, 25 IBLA 77 (1976)). After the establishment of a prima facie case, the burden of proof is on the Contestee. Here without question the Contestees carried no burden of proof. They introduced no samples, no assays, and no records even to support the assertion that six ounces of gold had been taken from the claim. Even if in fact six ounces of gold had been taken from the claim over the period of some thirty years, that fact is no evidence that a valuable mine exists. The very statement that six ounces of gold had been recovered over a period of thirty years would lead one to believe that either very little work had been done or that there was very little mineral present.

The Contestees argue that whether or not the mining claim is mineral in character has nothing to do with discovery and that it is not a necessary find under the mining law. Although I am not ruling on this question since I find it unnecessary to my decision in this case, it must be remembered that you cannot have a discovery on a claim that is nonmineral in character. Therefore one must conclude that proof of nonmineral in character is tantamount to a determination of no discovery.

I find from the weight of evidence that the long tunnel which was described by the claimant is not in fact on the claim at issue and therefore failure of the mining engineer to make an examination of that tunnel is immaterial to this proceeding. This finding is based on considering the KeKaWaKa both as a lode and as a placer claim.

Since the mining claimant, the Contestee herein, has failed to preponderate against the Contestant's prima facie case of nondiscovery, it becomes my duty to declare this claim to be null and void.

Therefore, I hereby find that the KeKaWaKa mining claim to be null and void.

E. Kendall Clarke
Administrative Law Judge

Appeal Information

An appeal from this decision may be taken to the Board of Land Appeals, Office of the Secretary, in accordance with the regulations in 43 CFR Part 4 (revised as of October, 1976). Special rules applicable to public land hearings and appeals are contained in Subpart E. If an appeal is taken, the notice of appeal must be filed in this office (not with the Board) in order to facilitate transmittal of the case file to the Board. If the procedures set forth in the regulations are not followed, an appeal is subject to dismissal. The adverse party to be served with a copy of the notice of appeal and other documents is the attorney for the United States Department of the Interior whose name and address appear below.

Enclosure: Additional information concerning appeals.

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